Supreme Court, U.S.
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No. 98-985

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

LINCOLN HERBERT

Petitioner

v.

**ROBERT J. REINSTEIN, DEAN
TEMPLE UNIVERSITY SCHOOL OF LAW
AND VICE PRESIDENT OF TEMPLE UNIVERSITY;
TEMPLE UNIVERSITY SCHOOL OF LAW;
&
TEMPLE UNIVERSITY**

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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cert. den., 508 U.S. 951 (1993) 6, 7

INTRODUCTION

Petitioner Lincoln Herbert, pursuant to Rule 15.5 of the Rules of this Court, submits this Reply Brief to address certain arguments which Respondents (hereafter, "Temple") raised in their Brief in Opposition to Mr. Herbert's Petition for Writ of Certiorari.

REPLY TO TEMPLE'S REASONS FOR DENYING THE WRIT

1.

Mr. Herbert's First Case against Temple Did Not, and Could Not, Challenge Temple's Ultimate Disciplinary Punishments.

Temple argued that Mr. Herbert misrepresented the procedural history of this case by not fully discussing his first lawsuit against Temple (hereafter, "*Herbert I*"). Temple's Brief in Opposition at 1. This charge is false. Temple intimates that Mr. Herbert had a "full and fair opportunity" in October, 1994 to litigate Temple's ultimate punishment decision of January, 1995.

A fuller discussion of *Herbert I* beyond that found in the Petition at 5, n.1, was not relevant to the present appeal. *Herbert I* was filed in September, 1994, and challenged only the Dean's May, 1994 summary suspension. It did not, and could not, challenge Temple Law School's later 2-½ year suspension and other punishments, which did not occur until after the complaint was filed. Temple's formal disciplinary

proceedings began in October, 1994 and concluded in January, 1995.

The main reason for the confusion in this case is the District Court's insistence that the matter go forward at a time when Temple's formal disciplinary process was incomplete. The District Court recognized that the process was not final, and restricted the scope of the hearing accordingly:

> MR. RESTIFO [Counsel for Lincoln Herbert]: Your Honor, if I might say this. The process being undertaken by the law school which is the subject really of this action, is still going on. And I don't think that --
>
> THE COURT: This of course will not touch the merits of what the law school may or may not determine is appropriate to do. . .

Appendix J at 61a.[1] (JA 788)

Thus, neither the formal disciplinary hearing nor the sanctions imposed were issues in *Herbert I*, and Mr. Herbert did not have a "full and fair opportunity" to litigate those issues.

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[1] In order to clarify reference to his Appendices, Mr. Herbert has referred to the exhibits in this Reply with letters and pagination sequential to the exhibits included as Appendices to the original Petition.

Had the District Court merely deferred a final hearing on the matter from October 13, 1994 until the disciplinary proceedings had been finalized in January, 1995, the confusing procedural issues regarding the statute of limitations and collateral estoppel would not have arisen. At any time after January 18, 1995 the District Court could have, and should have, directed Mr. Herbert to file an amended complaint addressing all of his claims for relief relating both to his initial suspension and to the disciplinary proceedings and the ultimate punishments imposed.

Temple's assertion that Mr. Herbert was allowed to fully and fairly litigate this case in October 1994 (Temple's Brief in Opposition at 2) is false. Temple confuses the receipt of some evidence of what happened during the formal disciplinary hearing with a full and fair review of those proceedings by the court, which never occurred. The official record of Temple's formal disciplinary hearings was the videotapes, which the District Court expressly deemed irrelevant to Mr. Herbert's first complaint, and which it refused to consider.

> MR. RESTIFO: Mr. Hittinger had said a number of times when I've questioned him about what happened, Mr. Hittinger said that there is a videotape available which shows what happened.
>
> Can we stipulate, Mr. Hittinger, that we can simply play it as an accurate representation of what went on?
>
> THE COURT: Well, how long is that?
>
> MR. RESTIFO: Well, if we don't play the whole thing, it's about six hours long, but certain portions.

> MR. HITTINGER [Counsel for Temple]: Well, your Honor--
>
> THE COURT: Well, I can't see how I can listen to that, and I can't see how it would be relevant for me to do so. I've heard your complaints, the plaintiff's complaints as to the denial of due process.
>
> I have heard the rationale, his explanations, and I'll hear also from the defense. I don't think that I should sit in judgment on the conduct of the proceedings themselves, and therefore I'm going to deny if you're making an offer to show that video, I'm going to deny it for that purpose.

Appendix K at 63a. (JA 356-357)

Similarly, Temple's assertion that Mr. Herbert "had a full and fair opportunity to raise [the psychiatric punishment] issue in his first lawsuit" during the remand hearing of February, 1996 (Temple's Brief in Opposition at 13) is utterly belied by the record of that proceeding. The scope of the remand hearing on damages did not go beyond the May, 1994 summary suspension by the Dean. At the suggestion of Temple's counsel, however, the District Court limited the scope of the remand hearing solely to Dean Reinstein's failure on May 5, 1994 to disclose all of his supposed reasons for summarily suspending Mr. Herbert:

> MR. HITTINGER: Yes. But if I might, your Honor, just one minute. I see the only issue before this Court that the Third Circuit has ruled that Dean Reinstein violated Mr.

> Herbert's civil rights because, and only because, on May 5th, he did not tell Mr. Herbert all the reasons why he suspending [sic] him, primarily about prior acts that Mr. Herbert had committed.
>
> And it's only that constitutional violation which the Third Circuit said he would be entitled to some damages, probably just nominal damages, and that's the only violation they found.
>
> THE COURT: Well, I think you're right. It was very narrow, and I'll ask the witness to try to stay within those narrow parameters. . . .

Appendix L at 64a. (JA 621).

Psychiatric punishment was not a part of Mr. Herbert's summary suspension, and was, therefore, not an issue at the remand hearing on damages.

2.

Temple's Argument Demonstrates

that the Circuits Are Split When Applying *Ricks*.

For the first time in the long course of this case, Temple now acknowledges that in order to start the statute of limitations in civil rights cases challenging administrative decisions, this Court's opinion in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), requires both a final decision and notice to the plaintiff. Temple's Brief at 8. A careful review of the various decisions in the circuits demonstrates that some

circuits have misinterpreted this Court's requirement in *Ricks* that the alleged discriminatory act must be final. This misinterpretation has led to the circuit split.

A comparison of the Third Circuit's decision in this case (hereafter, *"Herbert II"*) with the Seventh Circuit's decision in *Lever v. Northwestern University*, 979 F.2d 552 (7th Cir. 1992), *cert. den.*, 508 U.S. 951 (1993), exemplifies the wider split among the circuits discussed more fully in Mr. Herbert's Petition. The Seventh Circuit analyzes at great length both the finality of the alleged discriminatory act and when notice of the discriminatory decision was given to the plaintiff.

In *Lever*, a professor was denied tenure and attempted to file a discrimination complaint with the Equal Employment Opportunities Commission ("EEOC"), alleging that the discriminatory act was the denial of tenure. After trial, the District Court held that the EEOC complaint was untimely because the tenure denial, which was the alleged discriminatory act, occurred when a university dean recommended that Professor Lever not be tenured. Professor Lever contended that the denial of tenure did not occur until the Dean's "recommendation" was made final by the university's provost. If the dean's recommendation was the final decision, then the EEOC complaint was untimely. If, however, the provost's decision was the "final" one, then the EEOC complaint was timely. *Id.*, 979 F.2d at 553.

The Seventh Circuit began its analysis with the discriminatory act. *Id.* at 554. The question before the Court was when the final decision to deny tenure had actually occurred. After reviewing the entire record, the *Lever* District Court determined that the dean's letter had been the university's final decision to deny tenure. The Seventh

Circuit, applying the clearly erroneous standard of review, could not reverse on the factual record before it. *Id.* at 557.

The critical issue which the Seventh Circuit addressed in *Lever* went unaddressed by the Third Circuit in *Herbert II*, i.e., precise identification of the discriminatory act(s) alleged. Once the discriminatory act is identified, in accordance with this Court's opinion in *Ricks*, the analyzing court must then determine when the decision that is alleged to be the discriminatory act became a final decision, rather than a mere recommendation, or an expression of some future intention to act. This was the analysis which the Seventh Circuit performed in *Lever*, but which the Third Circuit failed to perform in *Herbert II*.

In *Ricks*, moreover, this Court distinguished, for limitations purposes, between direct review and collateral review (such as grievance proceedings). *Ricks* defined direct review as "an opportunity to influence a decision before it is made." 449 U.S. at 261. The amended complaint in *Herbert II* identified Temple's ultimate administrative decision as the act which violated his civil rights. Because Mr. Herbert had a chance to influence the administrative decision before it became final, the statute of limitations should not have been triggered.

Contrary to the approach in *Lever*, the Third Circuit in *Herbert II* did not discuss whether the October 17, 1994 announcement to impose sanctions was a final decision. Indeed, in its entire memorandum opinion, the Third Circuit did not mention the word "finality." It is plain from its memorandum opinion that the Third Circuit did not consider finality to be a relevant consideration in *Herbert II*, even though Mr. Herbert utilized Temple's direct review procedures to change the punishments recommended by the Discipline Committee. In fact, two of the punishments

announced on October 17, 1994 were never finalized by the direct review process and, therefore, were never imposed.[2]

The October 17, 1994 announcement by the Discipline Committee was not a final decision, and could not be final, under Temple's Code. Sections VI.D(7)(c) and (d) of Temple's Code expressly state (Appendix F at 46a):

> (c) If the sanction imposed by the Committee and upheld by the Panel or imposed by the Panel is either suspension or permanent expulsion of the Student, the sanction shall be automatically reviewed by the Plenary Faculty.
>
> (d) Otherwise, the Panel's determination shall be final and the Dean shall thereafter carry out that determination.

There is no ambiguity that if the recommended sanction is suspension, which it was in this case, the sanction must be reviewed by the Plenary Faculty before it becomes final. Despite Temple's incorrect statement to the contrary, this review would have been mandatory regardless of whether or not Mr. Herbert had pursued his administrative review. Temple's concession that *Ricks* requires both finality and notice makes the statute of limitations decision in *Herbert II* that much more questionable.[3]

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[2] The Law School Review Panel vacated the Discipline Committee's 100-hour psychological counseling punishment. Appendix E, 51a-54a. Later, the Plenary Faculty vacated the community service punishment.

[3] Temple cites *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439 (9th Cir. 1994), *cert. den.*, 513 U.S. 1127 (1995), a case which reinforces the need to analyze the

Because there is a clear split in the circuits on the need for finality when challenging administrative decisions, this Court should grant certiorari.

CONCLUSION

For the reasons stated in this Reply and in the initial Petition, the Petition for Writ of Certiorari should issue.

Respectfully submitted,

PAUL, REICH & MYERS, P.C.

By: _____
RICHARD P. MYERS

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precise discriminatory act before applying the *Ricks* principle regarding notice. In *Fobbs*, a doctor claimed that the discriminatory act was his summary suspension. 29 F.3d 1443-1444. By definition, a summary suspension is final when it occurs. *Herbert II* has nothing to do with a summary suspension; rather, *Herbert II* challenges a formal disciplinary proceeding under an administrative code which defined finality, and required finality, before punishment could be imposed.

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APPENDIX J

Excerpts from Transcript of Hearing of October 13, 1994

THE COURT [Judge Clarence C. Newcomer]: My law clerk has just handed me a copy of my Order dated September 21, 1994, and I'll read it, and this has been docketed in this case.

"Now, this 21st day of September 1994, upon consideration of the plaintiff's motion for a Temporary Restraining Order, it's hereby ordered that said motion is denied. All parties are hereby ordered to appear before this Court on Friday, September 30, 1994, of which this is a continued hearing, at 9:00 a.m. for a full and final hearing on the merit of this case, and it is so ordered." That's docketed in the Clerk's Office, and has been.

(JA 787)

. . .

MR. RESTIFO [Counsel for Lincoln Herbert]: Your Honor, if I might say this. The process being undertaken by the law school which is the subject really of this action, is still going on. And I don't think that --

THE COURT: This of course will not touch the merits of what the law school may or may not determine is appropriate to do. This has to do with whether or not this plaintiff was afforded his civil rights, his due process rights specifically. Well, proceed.

(JA 788)

. . .

MR. HITTINGER [Counsel for all of the defendants]: The Complaint in this case was filed on September 21st. In that Complaint which your Honor has, I don't see any mention whatsoever of -- obviously it couldn't be -- of the

October 3rd and October 10th hearings. I don't see any mention at all of the argument Mr. Restifo is making that the charges weren't specific enough, and that they were vague and ambiguous. This is not in the Complaint at all.

I'm afraid this case is being evolved as we go along, and that puts us at a severe disadvantage. What I'm requesting your Honor rule on is that the Complaint as written bind this case in these proceedings, and we'll defend it on that. But not allow Mr. Restifo to get in evidence that's beyond the Complaint, particularly evidence that's beyond the date of the Complaint.

(Pause in proceedings.)

MR. HITTINGER: Your Honor, if I could outline our argument --

THE COURT: Yes, sir.

MR. HITTINGER: -- as we'll present it. With all due respect to Mr. Restifo, these proceedings are really quite simplistic [sic]. There's really two issues before this Court, and only two issues based on this Complaint.

The first issue was -- is was [sic] Mr. Herbert provided all due process due to him under the circumstances prior to his suspension from law school by Dean Reinstein on May 5. That's a legal issue, it's a factual issue.

The second issue before your Honor is was [sic] Mr. Herbert suspended by Dean Reinstein because of his political beliefs and activities? . . . .

(JA 812-813)

APPENDIX K

Excerpt from Transcript of Hearing of October 18, 1994

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APPENDIX L

Excerpt from Transcript of Remand Hearing of February 20, 1996

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